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Foreword

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FOREWORD

The Loyola Law Review Symposium on the role and function of the United States Solicitor General concerns the tension and conflicts imposed on the unique position of the Solicitor General. The Solicitor General is an employee of the Attorney General, both of whom are appointed by the President and serve within the executive branch. The Solicitor General's statutory duty is to be the advocate for the United States in cases brought before the Supreme Court. Some view the Solicitor General as a person who has a degree of independence from the executive branch, a person the Court can rely upon as a "neutral advocate," though "neutral advocate" seems to be a contradiction in terms. Under this view, the Solicitor General is someone on whom the Court depends to inform the Court of the present and past status of the law, and to advise the Court on the ruling which would follow precedent. The arguments advanced by the Solicitor General, under this view, are not to be influenced by executive policy and agenda. When the Solicitor General advocates a government position, it is to be done by reliance on what the law "really is."

Perhaps the whole question of the Solicitor General's independence begs the essential question of the role and function of the President and the executive branch. How is it possible that the President is at all able to inject presidential policy statements into the law in the course of enforcing the laws and policies enacted by the legislative branch? If the Solicitor General is a servant of the "United States," the question is, who is the "United States?" Both the executive *and* the legislative branches? If the role of the legislative branch is to enact the law, including the policy behind the laws, what business does the President have in doing anything but enforcing that law? But then, why do we elect the President and why are we desirous of electing presidents on the basis of issues? Fundamentally, perhaps the debate about the role and function of the Solicitor General is really a debate about the role and function of the Executive in a government based on the concept of separation of powers.

A contrary view is that there is no conflict at all in the Executive advancing post-legislative policy nor in the Solicitor General advocating that policy. We expect the Executive to create policy and he does so every day. These policies are reproduced in the Code of Federal Regulations. Executive policy-making is virtually inherent in the idea of application of law; how else are legal ambiguities resolved other than on the

basis of policy and purpose? Arguably the injection of executive policy is an expected part of executing the law. Under this view, the Solicitor General is nothing more nor less than an advocate for the Executive. Perhaps the sole conflict facing the Solicitor General is the ethical conflict facing all advocates when asked to pursue an untenable legal position or advance a position not founded on an honest exposition of the applicable precedent.

The Symposium issue is composed of three parts. The first part consists of tributes to the late Wade McCree, who served as Solicitor General under the Carter Administration, and who serves as a role model for us all. Tributes by President Carter, Chief Justice Warren Burger, and former United States Attorneys General Griffin Bell and Benjamin Civiletti are included.

The second part of the Symposium is a series of reprints which serve to act as a small and select body of source material. These reprints include brief essays on the Office of the Solicitor General, as seen by Rex E. Lee, Burt M. Neuborne and Robert L. Stern. Also reprinted is an important document on the subject of the role and function of the Solicitor General, as authored by the Office of Legal Counsel. Lastly, testimony given by Professor Burt M. Neuborne, before the House Subcommittee on the Judiciary in March of 1987, serves as a final select source document.

The third part of the Symposium consists of the original essays on the subject by Professors Michael W. McConnell of the University of Chicago Law School, Joshua I. Schwartz of George Washington National Law Center, Richard G. Wilkins of the J. Reuben Clark Law School of Brigham Young University, and Eric Schnapper, Assistant Counsel of the NAACP.

The Editorial Board of the Law Review hopes that the legal community finds this contribution worthwhile and informative on the subject of the very difficult conflicts associated with separation of powers and the contemporary implementation of our constitutional system.

*David W. Meadows**
Chief Articles Editor

* The Board of Editors would like to thank Lia Woodall for her creative input in identifying the topic of this Symposium, and Professor Edward M. Gaffney, Jr., for his support and encouragement.